IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OLD REPUBLIC INSURANCE COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 14 C 02421
	)	
LEOPARDO COMPANIES, INC., d/b/a LEOPARDO CONSTRUCTION, and CHICAGO HOTEL HOLDINGS, INC.,	)	Judge John J. Tharp, Jr.
	)	
Defendants.	)	

ORDER

For the reasons stated in the Statement below, the motion for summary judgment of defendant-counterclaimant Leopardo Companies, Inc. ("Leopardo"), Dkt. 28, is granted, and the motion for summary judgment of plaintiff-counterdefendant Old Republic Insurance Company ("Old Republic"), Dkt. 31, is denied. A status hearing is set for March 25, 2015, at 9:00 a.m.

STATEMENT

Old Republic filed this two-count declaratory judgment action against Leopardo and defendant Chicago Hotel Holdings, Inc. ("CHH"). Count I seeks a declaration that Old Republic has no duty to defend or indemnify Leopardo under two policies issued to Edwards Engineering, Inc. ("Edwards")—Leopardo's subcontractor on certain work on a CHH property known as the Millennium Knickerbocker Hotel in Chicago (the "Knickerbocker Property")—in connection with underlying litigation relating to work performed by Edwards on the Knickerbocker Property, *Chicago Hotel Holdings, Inc. d/b/a Millennium Knickerbocker Hotel Chicago v. Leopardo Companies, Inc., et al.*, No. 2013 L 009579 (filed Aug. 26, 2013) [hereinafter the "Underlying Lawsuit"]. Compl., Dkt. 1, ¶¶ 1, 7, 12, 16, 20. Count II seeks a declaration that Old Republic is entitled to reimbursement of costs it incurred in connection with its current defense of Leopardo (pursuant to a reservation of rights) in the Underlying Lawsuit. *Id.* at ¶¶ 55-58. Leopardo counterclaimed in this case, seeking a declaration that Old Republic does have a duty to defend and indemnify Leopardo in connection with the Underlying Lawsuit. Dkt. 20, at 27-31. Jurisdiction is based on diversity, pursuant to 28 U.S.C. § 1332(a). *Id.* at 27; Compl., Dkt. 1, ¶ 5.

Leopardo and Old Republic now cross move for summary judgment on the "threshold issue of whether the underlying action alleges 'property damage caused by an occurrence' so as to trigger Old Republic's duty to defend." Old Republic Mot., Dkt. 31, at 1-2; Leopardo Mot., Dkt. 28, at ¶¶ 4-5. Old Republic seeks a declaration that it has no duty to defend (and is therefore entitled to reimbursement of its defense costs), and Leopardo seeks a declaration that Old Republic does have such a duty. For the following reasons, the Court agrees with Leopardo.

BACKGROUND

In February 2008, Leopardo entered into a contract with CHH to perform certain renovation work on the Knickerbocker Property. Leopardo SOF, Dkt. 30, ¶ 5.[1] Leopardo hired a number of subcontractors to perform work on the renovation project, including Edwards. *Id.* at ¶¶ 7, 16. In June and July 2008, Leopardo and Edwards entered into a "Subcontract Master Agreement" for work to be performed by Edwards on various projects and a separate "Subcontract Work Authorization Agreement," the latter of which provided for Edwards to do certain work on the Fan Coil Units ("FCUs") on the Knickerbocker Property, as a subcontractor on Leopardo's renovation work at that location. Old Republic SOF, Dkt. 32, ¶¶ 17-19. Pursuant to these two Agreements, Edwards was required to "procure and maintain" a commercial general liability ("CGL") policy naming Leopardo as an "additional insured." *Id.* at ¶ 20. "On June 26, 2008, a Certificate of Insurance was issued to Leopardo, as certificate holder, indicating that Old Republic had issued a commercial general liability ('CGL') policy to Edwards and, in the Special Provisions section of the Certification, stated that Leopardo was an additional insured on said policy 'when required by written contract, as respects work performed by Edwards on the Knickerbocker Hotel project." *Id.* at ¶ 21 (brackets omitted).

On August 26, 2013, CHH filed in the Circuit Court of Cook County the Underlying Lawsuit against Leopardo and another contractor (Gibson/Darr Architecture + Consulting, Inc., which is not a party to this action), "alleging that Leopardo and Gibson/Darr breached certain contractual obligations in connection with design and construction services performed at the" Knickerbocker Property. *Id.* at ¶ 7. As to Leopardo specifically, the Complaint in the Underlying Lawsuit (the "Underlying Complaint") alleged that "Leopardo's breaches resulted in defectively designed and constructed" FCUs, among other defects, and that "[t]he FCUs have already caused, and will continue to cause, moisture and water to drip onto guestroom ceilings and damage walls, surrounding construction materials and the fit and finishes of each guestroom." *Id.* at ¶¶ 12, 13 (k) (quoting Old Republic Ex. B (Underlying Complaint), Dkt. 34-5, ¶ 29). The Underlying Complaint thus stated a breach of contract claim against Leopardo, alleging that, as a result of the FCU defects, among others, CHH has incurred "millions of dollars in additional costs necessitated by (i) repairing and replacing damage to the Hotel caused by the aforementioned defects, as well as repairing the defects themselves and (ii) repairing and replacing damage to the Hotel's fit and fixtures caused by the aforementioned defects at the Hotel." *Id.* at ¶ 14 (quoting Old Republic Ex. B (Underlying Complaint), Dkt. 34-5, ¶ 75).[2]

---

[1] The motions here, like any motion for summary judgment, require "construing all facts and drawing all inferences in the light most favorable to the non-moving party." *Lagestee-Mulder, Inc. v. Consol. Ins. Co.*, 682 F.3d 1054, 1056 (7th Cir. 2012). Thus, because the parties have filed cross motions for summary judgment, the Court will "construe all inferences in favor of the party against whom the motion under consideration is made." *Tompkins v. Central Laborers' Pension Fund*, 712 F.3d 995, 999 (7th Cir. 2013) (quoting *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 692 (7th Cir. 1998)).

[2] CHH subsequently filed an Amended Complaint naming an additional defendant; "however, all allegations against Leopardo remain the same as those asserted in" the original Underlying Complaint. Old Republic Mot., Dkt. 31, at 5. For ease of reference, the Court will cite to the original Underlying Complaint, Old Republic Ex. B, Dkt. 34-5.

Leopardo tendered defense and indemnification of the Underlying Lawsuit to Old Republic, among other subcontractors and their insurers, after which "Old Republic denied coverage, but agreed to participate in Leopardo's defense, pending resolution of the instant declaratory action." Old Republic Mot., Dkt. 31, at 1. Although Old Republic has raised other "policy defenses" in its declaratory judgment Complaint in this case, the parties agreed to file early motions for summary judgment on the narrow issue of whether the Underlying Lawsuit alleges "property damage" caused by an "occurrence" so as to trigger Old Republic's duty to defend Leopardo as an "additional insured" under the two policies issued to Edwards. *Id.* at 1-2, 6. *See also* Joint Initial Status Report, Dkt. 25, at 5 ("Both Old Republic and Leopardo anticipate filing early motions for summary judgment on the legal issues of whether the Underlying Lawsuit alleges 'property damage' caused by an 'occurrence', at a minimum.").

Pursuant to this agreement, the parties filed cross motions for summary judgment on July 23, 2014. *See* Dkts. 28, 31. For its part, Old Republic contends "that it owes no duty to defend or indemnify Leopardo in the underlying action because the complaint does not allege any 'property damage' caused by an 'occurrence' so as to fall within the scope of coverage." Old Republic Mot., Dkt. 31, at 2. Conversely, Leopardo says the Underlying Complaint does allege "property damage allegedly resulting from the alleged acts or omissions of the named insured, Edwards," and, therefore, "Old Republic owes a duty to defend Leopardo." Leopardo Mot., Dkt. 28, ¶¶ 4-5.[3] Both sides agree that the motions turn on a question of law for the Court to decide, Leopardo Mem., Dkt. 29, at 4; Old Republic Motion to Defer, Dkt. 35, ¶ 3; Old Republic Mem., Dkt. 33, at 2; but each believes it is entitled to summary judgment in its favor. Leopardo Mot., Dkt. 28, ¶ 3; Old Republic Mem., Dkt. 33, at 8. As explained below, the Court concludes that Leopardo is right.

ANALYSIS

"Summary judgment is appropriate where the evidence before the court indicates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Lagestee-Mulder*, 682 F.3d at 1056 (*Abstract & Title Guar. Co., Inc. v. Chicago Ins. Co.*, 489 F.3d 808, 810 (7th Cir. 2007)). "Under Illinois law, the interpretation of an insurance policy is a question of law that is properly decided by way of summary judgment." *Nationwide Ins. Co. v. Central Laborers' Pension Fund*, 704 F.3d 522, 525 (7th Cir. 2013) (quoting *BASF AG v. Great Am. Assur. Co.*, 522 F.3d 813, 818-19 (7th Cir. 2008).[4]

---

[3] Because Leopardo's supporting Memorandum, Dkt. 29, raised additional issues that Old Republic required discovery to address, Old Republic filed a Motion to Defer consideration of those additional issues, pending resolution of this threshold question. Dkt. 35. The Court granted Old Republic's Motion to Defer on August 27, 2014, and ordered the parties' summary judgment response briefs to be "limited to the issue of whether the damages alleged in the underlying complaint constituted property damage caused by an occurrence to as to trigger the plaintiff's duty to defend." Dkt. 46. Thus, the Court's ruling herein granting Leopardo's Motion for Summary Judgment, Dkt. 28, pertains solely to that limited issue; no other issues raised in either party's summary judgment motion or supporting materials are addressed herein.

[4] The parties agree that Illinois law governs the issue presented, Old Republic Mem., Dkt. 33, at 2; Leopardo Mem., Dkt. 29, at 3-4, so Illinois law controls. *See Lagestee-Mulder*, 682 F.3d

"To determine whether an insurer's duty to defend has been triggered, a court must compare the allegations in the underlying complaint with the language of the insurance policy." *Lagestee-Mulder*, 682 F.3d at 1056. "If the underlying complaint alleges facts within or potentially within policy coverage, an insurer is obligated to defend its insured even if the allegations are groundless, false or fraudulent," *id.* (quoting *Gen. Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co.*, 215 Ill. 2d 146, 155, 828 N.E.2d 1092, 1098 (2005)), and "even if only one of several theories of recovery alleged in the complaint falls within the potential coverage of the policy." *Nautilus Ins. Co. v. Bd. of Dirs. of Regal Lofts Condo. Ass'n*, 764 F.3d 726, 731 (7th Cir. 2014) (quoting *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 223 Ill. 2d 352, 362, 860 N.E.2d 307, 314-15 (2006)). "Like any contract under Illinois law, 'an insurance policy is construed according to the plain and ordinary meaning of its unambiguous terms.'" *Schuchman v. State Auto Prop. and Cas. Ins. Co.*, 733 F.3d 231, 235 (7th Cir. 2013) (quoting *Auto-Owners Ins. Co. v. Munroe*, 614 F.3d 322, 324 (7th Cir. 2010)). Ambiguous terms are liberally construed in favor of the insured, but ambiguity exists only if the meaning of policy terms cannot be resolved by application of ordinary canons of construction. *Id.* at 238.

I. The Policy Language

The Old Republic policies at issue here are "standard occurrence-based commercial general liability" policies which provide coverage for "property damage" caused by an "occurrence." *See Lagestee-Mulder*, 682 F.3d at 1056; *see also* Old Republic Mem., Dkt. 33, at 3 ("The Old Republic policies are occurrence-based commercial general liability policies and, as such, apply only when there is 'property damage' caused by an 'occurrence.'" (quoting Old Republic SOF, Dkt. 32, ¶ 23 and Dkts. 34-2 and 34-3)). The policies define "property damage" as "physical injury to tangible property, including all resulting loss of use of that property," and an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* (quoting Old Republic SOF, Dkt. 32, ¶¶ 24-25 and Dkts. 34-2 and 34-3). This definition of "accident," however, has been refined by Illinois case law to exclude the "natural and ordinary consequences of" an act. *Nautilus*, 764 F.3d at 731 (quoting *Westfield Nat'l Ins. Co. v. Cont'l Cmty. Bank & Trust Co.*, 346 Ill. App. 3d 113, 117, 804 N.E.2d 601, 605 (2d Dist. 2003)). "Applying this principle in the context of development and building construction, several Illinois cases have held that 'damages that are the natural and ordinary consequences of faulty workmanship do not constitute an 'occurrence' or 'accident.'" *Id.* at 731-32 (quoting *Stoneridge Dev. Co. v. Essex Ins. Co.*, 382 Ill. App. 3d 731, 751-52, 888 N.E.2d 633, 652 (2d Dist. 2008) (collecting cases)).

Consistent with these holdings, the Seventh Circuit has summarized an insurer's "duty to defend" under CGL policies such as those at issue in the present case as follows: "Where the

---

at 1056 (applying Illinois law where "[t]he parties agree that Illinois law governs"); *Lyerla v. Amco Ins. Co.*, 536 F.3d 684, 687 (7th Cir. 2008) (same). *See also Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 580 F.3d 543, 546-47 (7th Cir. 2009) (reversing district court's ruling disregarding parties' choice-of-law agreement in cross motions for summary judgment seeking construction of CGL policy: "We honor reasonable choice-of-law stipulations in contract cases regardless of whether such stipulations were made formally or informally, in writing or orally. . . . 'Courts do not worry about conflict of laws unless the parties disagree on which state's law applies.'" (quoting *Wood v. Mid-Valley Inc.*, 942 F.2d 425, 427 (7th Cir. 1991)).

underlying suit alleges damage to the construction project ***itself*** because of a construction defect, there is no coverage. By contrast, where the complaint alleges that a construction defect damaged something ***other*** than the project, coverage exists." *Lagestee-Mulder*, 682 F.3d at 1057. "In other words, to find coverage, 'there must be damage to something other than the structure, i.e., the building," *id.* (quoting *CMK Devel. Corp. v. West Bend Mut. Ins. Co.*, 395 Ill. App. 3d 830, 842, 917 N.E.2d 1155, 1165 (1st Dist. 2009)), or "damage to other materials not furnished by the insured." *Id.* (quoting *Pekin Ins. Co. v. Richard Marker Assocs., Inc.*, 289 Ill. App. 3d 819, 822, 682 N.E.2d 362, 365 (2d Dist. 1997)). There are several rationales for this distinction, but chief among them are that extending coverage to faulty workmanship itself (an economic loss to be shouldered by the contractor), as opposed to "other" property protected by the insurance, "would transform the policy into something akin to a performance bond," *Nautilus*, 764 F.3d at 732 (quoting *Stoneridge*, 382 Ill. App. 3d at 752-53, 888 N.E.2d at 653), and potentially lead to a contractor being paid twice for its defective work, once by the customer and a second time by the insurer. *Id.* (citing *Lagestee-Mulder*, 682 F.3d at 1057).

II. The Underlying Complaint

Invoking the principle that "for coverage to exist, the complaint must allege that the construction defect damaged something *other* than the project itself," Old Republic Mem., Dkt. 33, at 4, Old Republic says it has no duty to defend Leopardo in the Underlying Litigation because: (1) The Underlying Complaint alleges no "facts of damage to anything other than the interior renovation work performed by Leopardo," Old Republic Mem., Dkt. 33, at 8; and (2) "To the extent" the Underlying Complaint's allegation of damage to the "fit and finishes" of each guestroom is "vague," it "cannot be interpreted to mean 'property damage' or damage to anything other than the work performed by Leopardo." Old Republic Opp., Dkt. 48, at 6. The problem with both arguments is that they focus incorrectly on "the work performed by Leopardo," rather than that of Edwards, which is the only basis for coverage referenced on the Certificate of Insurance issued to Leopardo. *See* Old Republic SOF, Dkt., 32, ¶ 21 ("Leopardo was an additional insured on said policy 'when required by written contract, as respects work performed by [Edwards] on [the Knickerbocker Hotel project]'" (brackets in original)).

Both arguments thus attempt to duck the Underlying Complaint's allegation of damage to guestroom "fit and finishes" caused by the faulty FCUs on which Edwards worked—work falling squarely within the Certificate of Insurance issued to Leopardo, *id.*—by assuming incorrectly that "the question of coverage is whether the underlying complaint alleges damage to something other than work and materials furnished by Leopardo." Old Republic Opp., Dkt. 48, at 5. According to Old Republic, "the question is not whether *Edwards*' work caused damage to property other than its work, but whether *Leopardo's* work caused damage to property other than *its* work." *Id.* (emphasis in original). From there, Old Republic argues that "the underlying complaint and the construction contract reveal that Leopardo performed ALL of the renovation work and was responsible for all materials used in the Project," and, therefore, "it is undisputed that Leopardo performed work on the 'fit and finishes' of the guestrooms.'" *Id.* at 7. Ergo, says Old Republic, any damage to such "fit and finishes" was to the "Project itself," and therefore not "property damage" caused by an "occurrence," as that term must be construed under the controlling Illinois case law. *Id.* But the premise—that coverage depends on the scope of *Leopardo's* work—is incorrect.

Indeed, Old Republic admits as much in its effort to insulate itself from any damages alleged in the Underlying Complaint caused by anyone other than Edwards. In defining the scope of its exposure in this action, Old Republic insists that "any additional insured coverage afforded under the policy would be limited to liability for property damage 'caused in whole or in part, by *Edwards* acts or omissions.'" Old Republic Opp., Dkt. 48, at 4 (quoting Old Republic SOAF, Dkt. 47, at 7, ¶ 6) (emphasis added, brackets omitted). In the same brief just a page later, Old Republic argues the opposite—that "the question is not whether *Edwards'* work caused damage to property other than its work, but whether *Leopardo's* work caused damage to property other than *its* work." *Id.* at 5 (emphasis in original). Oblivious to the inconsistency in its arguments, Old Republic essentially advances Leopardo's argument. Old Republic quotes directly from the policy's Additional Insured Endorsement, which plainly "provides coverage only with respect to liability for bodily injury or property damage caused, in whole or in part, by *your* acts or omissions; or the acts or omission of those acting on *your* behalf in the performance of *your* ongoing operations for the additional insured," with Old Republic itself substituting "your" in each case with either "Edwards" or "Edwards Engineering" in brackets. *See id.* at 4 ("any additional insured coverage afforded under the policy would be limited to liability for property damage 'caused in whole or in part, by [Edwards] acts or omissions'" (brackets in original)); Old Republic SOAF, Dkt. 47, at 7, ¶ 6 ("The Old Republic policies at issue contain an Additional Insured Endorsement for 'Owners, Lessees or Contractors – Scheduled Person or Organization' that provides coverage only with respect to liability for bodily injury or property damage caused, in whole or in part, by [Edwards Engineering's] acts or omissions; or the acts or omissions of those acting on [Edwards Engineering's] behalf in the performance of [Edwards Engineering's] ongoing operations for the additional insured." (brackets in original, quoting Dkt. 4, at 3)).

This construction by Old Republic itself of the Additional Insured Endorsement as referring to Edwards' acts or omissions (rather than Leopardo's) is consistent with the Old Republic policies, which define "you" and "your" as the "Named Insured," Dkt. 3, at 12; Dkt. 5, at 12, and with Illinois case law. *See Am. Nat'l Fire Ins. Co. v. Nat'l Union Fire Ins. Co. of Pitts., Pa.*, 343 Ill. App. 3d 93, 104-06, 796 N.E.2d 1133, 1142-44 (1st Dist. 2003) ("the 'you' in the National Insurance policy refers only to the named insured . . . and not to additional insureds"). Moreover, as noted above, the Certificate of Insurance issued to Leopardo similarly confirms that Leopardo is an additional insured "as respects work performed by Edwards." And, here again, Old Republic acknowledges this fact by correctly substituting "the Insured" with "Edwards" in brackets when quoting that Certificate: "Leopardo was an additional insured on said policy 'when required by written contract, as respects work performed by [Edwards] on [the Knickerbocker Hotel project].'" Old Republic Mot., Dkt. 31, at 6 (quoting Old Republic SOF, Dkt. 32, ¶ 21 (quoting Dkt. 2-2, at 1-3)) (brackets in original). This construction is buttressed by the balance of the Certificate, which prominently lists Edwards as "INSURED," and states that the Certificate "does not constitute a contract between the issuing insurer(s) . . . nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon." Dkt. 2-2, at 1-2. And, again, this construction is consistent with Illinois case law.[5]

[5] Illinois cases have consistently recognized that the policy's endorsement documents determine whose acts trigger an insurer's duties to an additional insured. *See, e.g.*, *Cincinnati Ins. Co. v. Dawes Rigging & Crane Rental, Inc.*, 321 F. Supp. 2d 975, 980-81 (C.D. Ill. 2004) (endorsement provided coverage "with respect to liability arising out of" named insured's

The policy documents thus compel the conclusion that, in this case, the scope of work that determines whether the Underlying Complaint alleges "property damage" caused by an "occurrence" within the meaning of a CGL policy—*i.e.*, damage to something other than the project itself—is Edwards' work, not Leopardo's. And since Edwards did not work on the "fit and finishes" of guestrooms—indeed, Old Republic stresses that the FCUs are "the only work" in which Edwards was involved, Old Republic Mem., Dkt. 33, at 6—the Underlying Complaint plainly alleges damages to something other than the *Edwards* project itself, thereby triggering Old Republic's duty to defend. It bears noting, moreover, that this conclusion dovetails with the rationales underlying the requirement of such extraneous damages: by insuring Edwards, and by issuing a Certificate of Insurance to Leopardo "as respects work performed by [Edwards]," Old Republic Mot., Dkt. 31, at 6, Old Republic's CGL policies assumed the risk of damage to something other than Edwards' defective work, which is precisely what triggers its duty to defend here. *See Lagestee-Mulder*, 682 F.3d at 1057 (CGL polices "are intended to protect the insured from liability for injury or damage to the persons or property of others; they are not intended to pay the costs associated with repairing or replacing the insured's defective work and products, which are purely economic losses" (quoting *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill. 2d 278, 289, 757 N.E.2d 481, 489 (2001)). Old Republic's efforts to focus instead on the work performed by Leopardo wrongly attempt to shift that now-realized risk to Leopardo.[6]

Old Republic nevertheless argues that the Seventh Circuit's decision in *Lagestee-Mulder*, along with another decision in this district, *Hartford Cas. Ins. Co. v. Constr. Builders in Motion, Inc.*, 966 F. Supp. 2d 777 (N.D. Ill. 2013), compel the opposite conclusion because their opinions purportedly "looked at the scope of the additional insured's work rather than [the] named

---

operations) (citing *Cas. Ins. Co. v. Northbrook Prop. & Cas. Ins. Co.*, 150 Ill. App. 3d 472, 498, 501 N.E.2d 812, 815 (Ill. App. 1st Dist. 1986)); *Indiana Ins. Co. v. Powerscreen of Chicago, Ltd.*, 2012 IL App (1st) 103667, ¶¶ 33-34, 975 N.E.2d 141, 151 (same, citing *Dawes Rigging*); *Am. Country Ins. Co. v. James McHugh Constr. Co.*, 344 Ill. App. 3d 960, 972, 801 N.E.2d 1031, 1040-41 (1st Dist. 2003) (endorsement limited to liability for named insured's acts); *Nat'l Union Fire Ins. Co. of Pitts., Pa. v. R. Olson Constr. Contractors, Inc.*, 329 Ill. App. 3d 228, 238, 769 N.E.2d 977, 984-85 (2d Dist. 2002) (same); *Am Country Ins. Co. v. Cline*, 309 Ill. App. 3d 501, 513-14, 722 N.E.2d 755, 765 (1st Dist. 1999) (same).

[6] For the first time in its Reply, Old Republic asserts without explanation that "the policy contains a Separation of Insureds provision" which states that the insurance applies "separately to each insured against whom claim is made or 'suit' is brought." Old Republic Reply, Dkt. 54, at 2. But in addition to being undeveloped and untimely (arguments advanced first in a reply brief are waived, *Nationwide*, 704 F.3d at 527), the assertion lacks potential, because such a provision does not alter "the liability limits of the policy" or its additional-insured endorsement. *See Patrick Eng'g, Inc. v. Old Republic Gen. Ins. Co.*, 2012 IL App (2d) 111111, ¶¶ 22, 27, 35-36, 973 N.E.2d 1036, 1042-43, 1045-46 (additional-insureds endorsement confirmed coverage for damage that "'results from' work done by or for the named insured"). Similarly, Leopardo points for the first time in its Reply to a "subcontractor exception" to one of the policies' exclusions and argues that the exception "would be superfluous" if the policies did not cover "a subcontractor's work in the first place." Leopardo Reply, Dkt. 51, at 2. Here, too, the argument is both late and lacking, since "analysis of exclusions and exceptions thereto only becomes relevant once coverage is established." *Lyerla*, 536 F.3d at 692 n.4.

insured's scope of work" when determining whether the underlying complaint alleged damage to something outside of that "scope of work." Old Republic Reply, Dkt. 54, at 5. But they did not. On the contrary, *Hartford* acknowledged expressly that the additional insureds in that case had coverage "with respect to liability arising out of Pawel's [the named insured's] ongoing operations performed for that insured," *Hartford*, 966 F. Supp. 2d at 785, confirming that the question is controlled by the policy documents, as noted above. *See supra* note 5. Because the work of the named insureds in both *Lagestee-Mulder* and *Hartford* involved construction of a "structure," however, both courts correctly regarded the entire "structure" within their scope of work. *See Lagestee-Mulder*, 682 F.3d at 1058; *Hartford*, 966 F. Supp. 2d at 789-90. This analysis was consistent with Illinois case law likewise holding that "damage to the structure itself—regardless of whether the Insureds worked on that particular part of the structure—cannot be an accident" within the meaning of a CGL policy. *Nautilus Ins. Co. v. 1735 W. Diversey, LLC*, No. 10 C 425, 2011 WL 3176675, *5 (N.D. Ill. July 21, 2011) (citing *Viking Constr. Mgmt., Inc. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34, 53-53, 831 N.E.2d 1, 16 (1st Dist. 2005)). Here, by contrast, the Underlying Complaint alleges damage "to something other than the structure" and "to other materials not furnished by" Edwards—namely, damage to "the fit and finishes of each guestroom." Old Republic Ex. B (Underlying Complaint), Dkt. 34-5, ¶ 29. *See also Lagestee-Mulder*, 682 F.3d at 1057 ("there must be damage to something other than the structure"; "damage to other materials not furnished by the insured" (quoting *CMK Devel.*, 395 Ill. App. 3d at 842, 917 N.E.2d at 1165; *Pekin*, 289 Ill. App. 3d at 822, 682 N.E.2d at 365)). Unlike *Lagestee-Mulder*, this ***is*** a case in which the water infiltration described in the underlying complaint is presented as the cause of specified property damage. *See* 682 F.3d at 1058.

The only remaining question, then, is whether the property damage alleged in the Underlying Complaint is specified sufficiently—in other words, whether the term "fit and finishes" is too "vague" to credit. Old Republic's suggestion that the term "fit and finishes" is vague at all is half-hearted, at best. *See* Old Republic Opp., Dkt. 48, at 6 ("*To the extent* the allegation of 'fit and finishes' of guestrooms is vague, our courts have held that a vague allegation of damages cannot be interpreted to mean 'property damage'" (emphasis added)). In any event, Old Republic's own submission (once again) undermines its own argument, this time demonstrating that the term is not vague. Old Republic's Local Rule 56.1(b)(3)(C) Statement of Additional Material Facts points specifically to portions of the Leopardo/CHH construction contract providing for Leopardo to perform certain "work relating to the 'finishes' of each guestroom," including installation of "carpet, wallcovering, stone tile and stone countertops." *See* Dkt. 47, at 6-7, ¶¶ 1-5 (citing Dkt. 1-3, at 32, 37, 39-47 (Leopardo/CHH construction contract)). As Old Republic acknowledges, such materials were identified explicitly as "finishes" on Exhibit D to the Leopardo/CHH construction contract (a schedule of "Owner Supplied Materials") to be delivered by CHH and installed by Leopardo. *See id.* at ¶¶ 4-5 (quoting Dkt. 1-3, at 32 and 37 (Leopardo/CHH construction contract)); for clearer copies, *see* Leopardo Answer Ex. A, Dkt. 20-1, at 118 and 123; *see also* Old Republic Reply, Dkt. 48, at 6 ("Exhibit D to the Construction Contract identifies the 'finishes' Leopardo was to install including carpet, wallcoverings, stone tile and countertops."). The Underlying Complaint's allegation of damage to such "other property," through its allegation of damage to the "finishes" of each guestroom, Dkt. 34-5, ¶ 29, is sufficient by itself to trigger Old Republic's duty to defend. *See* Old Republic's Mem., Dkt. 33, at 5 (identifying "floor rugs" and "carpets" as "other property" (citing cases)); *see also Nautilus*, 764 F.3d at 731 (insurer obligated to defend even if only one of several theories alleged in underlying complaint falls within potential coverage of policy).

Additionally, this understanding of "finishes" informed by the Leopardo/CHH contract as referring to such accoutrements as "carpet, wallcoverings, stone tile and countertops," Old Republic Reply, Dkt. 48, at 6, jibes with the ordinary meaning of "fit" as "to provide; furnish; equip"; or "to furnish with supplies, equipment, clothing, furniture, or other requisites," as in "fit out or up." Random House Dictionary of the English Language 726 (2d ed. 1987). Thus, while the meanings of "fit" and "fit and finish" may depend on the contexts in which they are used, the latter has been used in the construction context to refer to various interior items, such as "cabinets, flooring and light fixtures." *See, e.g.*, *Garza v. Cantu*, 431 S.W.3d 96, 106 (Tex. Ct. App. 14th Dist. 2013) (referring to "medium- to high-priced 'fit and finish' items, such as cabinets, flooring and light fixtures"). The Underlying Complaint's allegation of damages to the "fit and finish" of each guestroom thus clearly connotes damage to items other than the structure and other than materials provided by Edwards. And indeed, the Underlying Complaint is careful to allege repeatedly that such "fit"-related damages affected "property other than the work performed by Defendants during the interior renovation project," and are separate from the "defects themselves" and the "damage to the Hotel caused by the aforementioned defects." *See* Dkt. 34-5, ¶¶ 2, 29, 75. This, too, is sufficient to trigger Old Republic's duty to defend. *See Milwaukee Mut. Ins. Co. v. J.P. Larsen, Inc.*, 2011 IL App (1st) 101316, ¶¶ 20-21, 956 N.E.2d 524, 530-31 (although damages to "personal property were not expressly described, we must construe the pleadings liberally to allow for coverage, or, at least the potential for coverage," where the underlying complaint alleges such damages were "in addition to" those "associated with the repair or replacement of the faulty" work).

*   *   *

For the foregoing reasons, the Court concludes that the answer to the "threshold" question posed by Old Republic's and Leopardo's motions for summary judgment—"whether the underlying action alleges 'property damage caused by an occurrence' so as to trigger Old Republic's duty to defend," Old Republic Mot., Dkt. 31, at 2; Leopardo Mot., Dkt. 28, at ¶¶ 4-5—is, yes, it does. And, because Old Republic's duty to defend has been triggered, Old Republic is not entitled to reimbursement of the costs it has incurred in connection with defending Leopardo in the Underlying Lawsuit. *See* Old Republic Mot., Dkt. 31, at 8. The Court therefore grants Leopardo's Motion for Summary Judgment, Dkt. 28, and denies Old Republic's Motion for Summary Judgment, Dkt. 31.

John J. Tharp, Jr.
United States District Judge

Date: March 11, 2015